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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SOUBAN SOYINTHISANE, Defendant and Appellant.	F066308 (Super. Ct. No. F11906746) **OPINION**
In re SOUBAN SOYINTHISANE, On Habeas Corpus.	F068793

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan B. Conklin, Judge. ORIGINAL PROCEEDINGS; petition for writ of habeas corpus.

Michael Aed and Amy Guerra for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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Souban Soyinthisane was convicted in a court trial of one count of discharging a firearm in a grossly negligent manner (Pen. Code, § 246.3, subd. (a))[1], eight counts of assault on a peace officer with a semiautomatic firearm (§§ 245, subd. (d)(2), 12022.53, subd. (c)), and one count of driving in willful and wanton disregard for safety of persons or property while evading an officer (Veh. Code, § 2800.2, subd. (a)). Weapon enhancement allegations that Soyinthisane personally and intentionally discharged a firearm in the commission of the offenses were found true (§§ 12022.53, subd. (c), 12022.5, subd. (a)). Soyinthisane was given a total state prison term of 54 years.

Soyinthisane appealed from his conviction and on October 7, 2013, filed his opening brief based on alleged ineffective assistance of trial counsel. On February 3, 2014, Soyinthisane filed a Petition for Writ of Habeas Corpus (hereafter the petition) based on the same ineffective assistance of counsel allegations. The contentions both on direct appeal and in the petition are that counsel was ineffective: (1) for failing to investigate and present a defense based on mental disease or defect; (2) for failing to challenge the officers' testimony that muzzle flash evidence indicated Soyinthisane was aiming at the officers when firing a gun from the window of his vehicle; and (3) for failing to object to lack of an interpreter at various hearings. Soyinthisane also alleges cumulative error. Soyinthisane asks and we grant his request for consolidation of the petition and the appeal for purposes of resolution by a single opinion.[2]

We reject Soyinthisane's contentions on appeal and affirm the judgment. We also deny the petition, finding Soyinthisane has failed to make a prima face case that he is entitled to relief.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] The appeal in case No. F066308 and the original proceeding in case No. F068793 are hereby ordered consolidated under case No. F066308, and all documents shall be filed in that case.

STATEMENT OF FACTS

On November 27, 2011, around 11:00 p.m., Officer Brian Sturgeon was in uniform driving his marked patrol vehicle when he noticed a silver Mercedes traveling in the opposite direction. The driver of the vehicle, Soyinthisane, made eye contact with Sturgeon but then quickly looked away. Sturgeon made a U-turn and followed Soyinthisane. When Sturgeon stopped at an intersection about 75 yards from the Mercedes, he heard several gunshots that sounded as if they were coming from the location of the Mercedes.

Sturgeon called for backup and followed Soyinthisane, who made several quick turns in an effort to evade the officer. Once backup arrived, Sturgeon activated his lights and siren, as did several other police vehicles, to pull Soyinthisane over.

Soyinthisane eventually pulled into the shopping center parking lot, slowed his vehicle to a near stop, extended his hand out of the window, and fired four or five shots from a semiautomatic handgun in Sturgeon's direction. Sturgeon was about 30 feet from Soyinthisane's vehicle when he saw the muzzle flash in his vehicle's direction. Soyinthisane continued to slowly drive through the parking lot, firing two to three more shots in Sturgeon's direction.

Soyinthisane then left the parking lot and the chase continued. In the middle of an intersection, Soyinthisane fired four or five additional shots at the officers following him. Soyinthisane got onto the freeway and accelerated to speeds exceeding 125 miles per hour. When he exited the freeway, he struck a cement median, sending the vehicle airborne. When the vehicle landed, he continued to drive away from the officers.

Soyinthisane eventually stopped his vehicle, placed his hands outside the driver's side window, exited the vehicle, and stood with his hands above his head. He obeyed the officers' order to get on the ground. The officers discovered that Soyinthisane was wearing a "ballistics" vest.

Officer Tom Canales, in uniform and driving a marked patrol vehicle, was also involved in the chase. In the parking lot, Canales was less than 30 feet from Soyinthisane's vehicle and roughly 10 feet from Sturgeon's vehicle. Canales explained that a "mushroom" pattern muzzle flash can be seen when a person fires in your direction; a "cone pattern" muzzle flash can be seen if a person is standing to the side of a firearm fired into the air. In the parking lot, Canales saw a "mushroom" pattern muzzle flash firing in his direction.

When Soyinthisane left the parking lot, Canales followed him. Canales was directly behind Sturgeon when he heard Soyinthisane fire a three to five shot volley.

Officer Christopher Hinojos, in uniform and driving a marked patrol vehicle, responded to assist Sturgeon. In the parking lot, Hinojos's vehicle was directly behind Sturgeon's vehicle. Hinojos saw what looked like glass shattering and heard shots fired. Based on the shattered glass, it appeared that the shots were fired in his direction. When the chase ended, Hinojos searched Soyinthisane's vehicle and found a loaded handgun, shotgun rounds, and a shotgun.

Officer Frederick Williams's marked patrol vehicle was diagonal to Soyinthisane's in the parking lot. Williams saw Soyinthisane reach his arm out of the window, heard three or four shots, and saw muzzle flash pointing at the officers behind Soyinthisane.

Officer Joshua Knapp described the armor Soyinthisane had on as a "ballistic resistant vest." Knapp opined that Soyinthisane appeared to be assaulting the officers to force them to take action.

In the parking lot, Officer Kenneth Webb saw Soyinthisane's hand come out of the driver's side window, holding the gun upside down and angled backwards. Webb saw Soyinthisane fire the handgun about six times towards at least three marked patrol vehicles behind Soyinthisane.

Defense

Soyinthisane's sister, Bounthan Vounghera, testified that Soyinthisane had led a difficult life, struggling with drugs, being a single father, and having been in a bad marriage ending in divorce. Vounghera had seen her brother several days before the chase and he appeared to be depressed.

Soyinthisane testified on his own behalf that he was firing at the police officers chasing him, but had pointed the gun in the air when he fired it. Soyinthisane had been depressed and wanted to die; he wanted the police to shoot him. Soyinthisane began taking psychiatric medication after the car chase, which helped his mental state.

DISCUSSION

I. INEFFECTIVE ASSISTANCE OF COUNSEL

A. General Principles

Because the essence of Soyinthisane's contentions is ineffective assistance of counsel, we begin with an examination of the general principles of law which apply to this area. We start with the accepted principle that a criminal defendant has the right to the reasonably competent assistance of an attorney acting as his diligent, conscientious advocate. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 215 (*Ledesma*).) A claim of ineffective assistance of counsel has two components:

> "'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] [¶] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness.' [Citation.] To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

> different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391; see *In re Alvernaz* (1992) 2 Cal.4th 924, 934 (*Alvernaz*).)

Prejudice can be shown when counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense or that there is a reasonable probability the result would have been different in the absence of the alleged ineffectiveness. (*Strickland, supra,* 466 U.S. at pp. 687-689; *Ledesma, supra,* 43 Cal.3d at pp. 215-218.) If the defendant does not carry his or her burden of showing prejudice, a reviewing court may reject the claim without determining whether counsel's performance was deficient. (*People v. Kipp* (1998) 18 Cal.4th 349, 366; *Alvernaz, supra,* 2 Cal.4th at p. 945.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland, supra,* at p. 697.)

As our Supreme Court held in *People v. Mai* (2013) 57 Cal.4th 986, "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding. [Citations.]" (*Id.* at p. 1009.)

Soyinthisane's petition repeats the allegations of ineffectiveness of counsel in his direct appeal. "An appellate court receiving [a petition for a writ of habeas corpus] evaluates it by asking whether, assuming the petition's factual allegations are true, the petitioner would be entitled to relief. [Citations.] If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an [order to show cause]. [Citations.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

Pursuant to our request, respondent has filed an informal response to assist us in our determination of whether a prima facie case has been stated. (See Cal. Rules of Court, rule 8.385(b); *People v. Romero* (1994) 8 Cal.4th 728, 737.)

In order to state a prima facie case of ineffective assistance of counsel, a defendant must plead with particularity facts, and provide reasonably available documentary evidence, that if true, show "'both (1) that counsel's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been more favorable to the defendant, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.]' [Citations.]" (*In re Scott* (2003) 29 Cal.4th 783, 811.)

Soyinthisane's criticism is largely directed at trial counsel's lack of investigation and tactical choices. "[T]he range of constitutionally adequate assistance is broad, and a court must accord presumptive deference to counsel's choices about how to allocate available time and resources in his or her client's behalf. [Citation.] Counsel may make reasonable and informed decisions about how far to pursue particular lines of investigation. Strategic choices based upon reasonable investigation are not incompetent simply because the investigation was less than exhaustive. [Citation.]" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1252, superseded by statute on another ground as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; *In re Andrews* (2002) 28 Cal.4th 1234, 1254 ["valid strategic choices are possible even without extensive investigative efforts"].)

Different counsel may choose to conduct investigations in different ways, and it is for counsel, not this court, to decide how to obtain the information needed to prepare adequately for trial. (See *People v. Bolin* (1998) 18 Cal.4th 297, 334 [declining to criticize counsel for lack of attack in cross-examining the prosecution's expert witnesses and the failure to call defense experts].) "What matters is the substance of the

investigation - whether counsel in fact explored those avenues reasonable counsel would have pursued in light of what was known and in the light of the chosen defense strategy." (*In re Thomas* (2006) 37 Cal.4th 1249, 1264.)

B. Mental Defect Defense

In his appeal and in his petition, Soyinthisane contends that trial counsel was constitutionally ineffective for failing to investigate his mental health history in order to present an insanity defense. According to Soyinthisane, "[h]ad counsel pursued this defense, he could have presented specific evidence about the fact that [Soyinthisane] could not distinguish right from wrong at the time of the offense, believing that the police officers he shot at were ghosts."

1. Procedural Background

After announcing its verdict on September 24, 2012, the trial court set the matter for sentencing and ordered a forensic psychiatric evaluation of Soyinthisane by Dr. Howard Terrell. In doing so, the court explained:

> "I have no concerns at all about the defendant's competency. None observed in court. He appears to me to be very alert, communicative. Though I understand nothing of his language, and though he was at times struggling with the questions, he was clearly able to understand the questions and able to express himself. He did his best to try to express to the Court his emotional state at the time."

Dr. Terrell conducted the evaluation of Soyinthisane on October 9, 2012. During the evaluation, Soyinthisane told Dr. Terrell that he had used methamphetamine, marijuana, and alcohol on the day of his arrest and was "very, very intoxicated" at the time. He also told Dr. Terrell that he had wanted the officers to kill him, but also that he shot his gun into the sky to scare away ghosts he thought were chasing him. Dr. Terrell concluded, in part:

> "[T]he defendant's violent and illegal behavior was a direct product of his longstanding abuse of cocaine, methamphetamine and alcohol. His

> substance abuse has been his misdirected way of trying to deal with chronic depression. [¶] At the time of the crime, he was very likely psychotic due to the acute intoxicating effects of methamphetamine and cocaine which were likely made even worse by his consumption of alcohol. [¶] Because his psychosis was from a self-induced intoxication, I do not believe he would qualify for a plea of not guilty by reason of insanity."

2. Applicable Law and Discussion

In order to prevail on a defense of insanity, the defendant must show, by a preponderance of the evidence, that, at the time the offense was committed, the defendant was incapable of knowing or understanding the nature of his or her act or of distinguishing right from wrong. (*People v. Lawley* (2002) 27 Cal.4th 102, 169-170.) Section 29.8, in part, "bars an insanity defense based solely on addiction to or abuse of intoxicating substances." (*People v. Cabonce* (2009) 169 Cal.App.4th 1421, 1440 [referring to section 25.5, which was renumbered 29.8 unaltered].)

In his appeal, Soyinthisane contends that trial counsel was aware, from Soyinthisane's sister's testimony, that Soyinthisane was "more depressed" before the shootings. Trial counsel was also aware, per Soyinthisane's testimony, that psychiatric medication available at the jail had "assisted [him] in stabilizing" his mental "capabilities." And yet, according to Soyinthisane, trial counsel's theory of defense did not address his mental health, but instead focused on developing sympathy or mitigation by arguing that Soyinthisane wanted the police to kill him as opposed to wanting to injure the police. But, as characteristic of Soyinthisane's arguments on appeal and in his petition, he focuses on what counsel did not do and ignores what was done.

In support of his petition, Soyinthisane submitted appellate counsel's declaration, which is before this court as an exhibit to the petition, stating that Soyinthisane's trial counsel told her that he could not recall the specifics of the case, but that he had not pursued a mental health defense because he did not think anyone would believe that someone who shot at officers while wearing a security vest "was crazy." We note first

that while the declaration by appellate counsel states that she communicated with trial counsel by letter, she did not "include copies of reasonably available documentary evidence supporting [her] claim …. [Citations.]" (*People v. Duvall, supra,* 9 Cal.4th at p. 474.) Trial counsel's responding letters were not included with the petition. Furthermore, it can be inferred from trial counsel's alleged response that he weighed the options and concluded that a mental health defense would have been unsuccessful. In other words, that there was a rational tactical purpose for the challenged act. (*People v. Mai, supra,* 57 Cal.4th at p. 1009.)

Trial counsel's approach is supported by the evidence at trial, which was that when Soyinthisane's vehicle finally came to a stop, he placed his hands out of the driver's side window, exited the vehicle, and stood with his hands above his head. He obeyed the officers' order to get on the ground. Officers then discovered that Soyinthisane was wearing a ballistics vest. In short, Soyinthisane's conduct was inconsistent with one who is incapable of knowing or understanding the nature of his acts or of distinguishing right from wrong. (*People v. Lawley, supra,* 27 Cal.4th at pp. 169-170.) Trial counsel was well within reason not to pursue an argument that Soyinthisane did not know he was wrongfully shooting at police officers. This decision was later validated by Dr. Terrell's examination, which concluded that, at the time of the crime, Soyinthisane was "very likely psychotic due to the acute intoxicating effects of methamphetamine and cocaine which were likely made even worse by his consumption of alcohol," in essence barring an insanity defense pursuant to section 29.8. (*People v. Cabonce, supra,* 169 Cal.App.4th at p. 1440.)

Soyinthisane also submitted declarations by both Soyinthisane's brother and sister, attached to the petition, stating that they had expressed concern to trial counsel about Soyinthisane's struggles with "issues related to mental health," but that counsel did not follow up with any member of Soyinthisane's family. But again, these declarations do

not show that trial counsel failed to investigate Soyinthisane's mental health. Instead, they simply assert that Soyinthisane's siblings did not know whether or not trial counsel conducted such an investigation.

Finally, attached to the petition is a declaration from Psychologist Harold Seymour, dated January 28, 2014, in which he provides an opinion based on statements from appellate counsel, Soyinthisane's probation report, and Dr. Terrell's report. Noting that Dr. Terrell attributed Soyinthisane's Major Depressive Disorder and Psychotic Disorder to substance abuse, Dr. Seymour opined that, since Dr. Terrell's report stated that Soyinthisane had suffered from depression and suicidal thoughts since his youth and he had not begun using alcohol and drugs until his early 20's, his serious mental health issues predated his drug and alcohol use. Dr. Seymour also noted Soyinthisane's previous suicide attempts by overdose; a family history of depression; and his mental state while in jail, which included being given an antidepressant. Dr. Seymour concluded "that there are multiple facets to this case that suggest that a thorough investigation of Mr. Soyinthisane's mental health, both historically and at the time of the crime, would have been a prudent and necessary element in the creation of a criminal defense." However, Dr. Seymour did not evaluate Soyinthisane, nor did he ever opine that Soyinthisane was insane at the time of his charged conduct.

Given this record, Soyinthisane has failed to establish a prima facie case that trial counsel was ineffective for failing to put forth an insanity defense or that he was prejudiced in any way by trial counsel's choices in this regard. Counsel's strategy to forego an insanity defense and instead concentrate on highlighting Soyinthisane's lack of intent was well "within the permissible range of competent representation." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.)

We reject Soyinthisane's ineffectiveness claim related to counsel's failure to explore a mental health defense.

C. Failure to Object to Evidence

Soyinthisane next contends, both on direct appeal and repeated in his petition, that trial counsel was ineffective by failing to object to the testimony of Officers Canales and Williams, who both concluded that Soyinthisane fired at the officers based, in part, on "muzzle flash." Soyinthisane argues such a conclusion should have been excluded as expert testimony lacking foundation. He further argues prejudice because this evidence was the "single most important moment" of his case, constituting the primary evidence that Soyinthisane intended to harm the officers rather than harm himself. We find no prejudicial error.

1. Procedural Background

At trial, Officer Canales, who had been a law enforcement officer for 19 years, testified that when Soyinthisane fired his gun in the parking lot, he could see a "muzzle flash from the driver side of the Mercedes coming in my direction." Canales explained that he was familiar with firearms and muzzle flash, which he described as "a burst or explosion protruding from the barrel of the firearm after it has been fired." According to Canales, you can tell from the muzzle flash which direction the weapon is pointed because:

> "[T]he muzzle flash extends itself from the barrel of the firearm. If I were to fire a weapon in the air, you would see … the muzzle flash come from the barrel of a weapon in a cone pattern. If you were in front of that, it is more of a mushroom effect."

When Soyinthisane fired the weapon, Canales saw "[t]he mushroom effect coming in [his] direction." On cross-examination, trial counsel questioned Canales further about the difference between "cone shaped" and "mushroom shaped" muzzle flash.

Officer Williams, who had been a police officer for 13 years, also testified about the muzzle flash he saw in the parking lot at the time Soyinthisane fired his weapon. According to Williams, he saw "an arm reach out of the driver side, and then [he]

observed or heard three to four shots and muzzle flash pointing back towards the officers." Williams explained that muzzle flash occurs "when a firearm is discharged, the round that is coming through the chamber or cylinder, when it exits because of the heat it creates like a spark, and at night, it is very visible to see."

Williams testified that he was trained in the use of firearms on a quarterly basis by taking a qualification course, which required that they shoot a certain amount of rounds, most done at night. When asked what practical experience he had in relation to observing muzzle flash from a weapon, Williams stated, "By firing my own handgun during the qualification courses at night," as well as observing the muzzle flashes from other officers' guns. Williams testified that, based on the muzzle flash, it can be determined which direction a weapon is pointed. On cross-examination, Williams was asked about "ejection port flash," which the officer described as occurring when an "expended cartridge is expended from the port chamber," but that he did not see an ejection port flash from Soyinthisane's gun.

2. Applicable Law and Analysis

Lay opinion testimony based on the personal observations of the witness is admissible if no particular scientific knowledge is required or where it is necessary as a practical matter because the witness cannot otherwise articulate the subtle nuances of the observations. (*People v. Chapple* (2006) 138 Cal.App.4th 540, 547; *People v. Farnam* (2002) 28 Cal.4th 107, 153; Evid. Code, § 800.) In contrast, an expert is permitted to offer an opinion on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a); *People v. Cole* (1956) 47 Cal.2d 99, 103.) "'And a particular expert is sufficiently qualified if the witness has sufficient skill or experience in the field so that his [or her] testimony would be likely to assist the jury in the search for the truth.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

Here Soyinthisane argues the officers' familiarity with gunfire and muzzle flash went beyond common experience and, thus, was beyond the limits of proper lay-opinion testimony and was admitted without proper foundation as an expert. He suggests it was akin to an officer's impermissible use of an HGN (horizontal gaze nystagmus) test for inebriation based on the involuntary eyeball movements of a suspect, a test which involved the assertion of a scientific legitimacy beyond common knowledge. (*People v. Williams* (1992) 3 Cal.App.4th 1326, 1331-1333.) We disagree.

The officers did not purport to be applying any sort of scientific expertise in reaching their conclusion that the gun was pointing toward the officers when it was fired. Rather, their opinions were based on their personal experience having been around guns when fired, particularly at night. Their testimony was therefore lay opinion that can be given by persons who share the officers' not uncommon experience and familiarity with gunfire. Thus, the testimony was proper and trial counsel was not ineffective for failing to object to it. (See *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["[c]ounsel is not ineffective for failing to make frivolous or futile motions"].)

On this record, Soyinthisane has failed to establish a prima facie case that trial counsel was ineffective for failing to object to the muzzle flash testimony of Officers Canales and Williams. In any event, even without the muzzle flash testimony of Canales and Williams, there was convincing evidence that Soyinthisane committed the assaults on the officers and Soyinthisane has failed to demonstrate "'a reasonable probability'" that even if the testimony had been objected to, "'the results of the proceeding would have been different.'" (*People v. Bolin, supra,* 18 Cal.4th at p. 333.) Assault "requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) Officer Sturgeon testified that he was about 30 feet from Soyinthisane's vehicle when he saw a hand holding a

semiautomatic handgun come from the driver's side window, reach back, "just slightly above level," and fire several shots "back towards [his] vehicle." Officer Hinojos testified that he heard shots fired and saw what looked like glass shattering in his and Sturgeon's direction. And Officer Webb testified that he saw a hand holding a handgun come out of the driver's side window angled back towards the police vehicles behind it, and six shots fired. Webb explained that the gun was "upside down" and "along the roof line" of Soyinthisane's vehicle. Both Sturgeon and Webb also testified that they observed "muzzle flashes" from Soyinthisane's firearm.

D. Failure to Object to Lack of an Interpreter

In a claim made on direct appeal and repeated in his petition, Soyinthisane contends trial counsel was ineffective for failing to object to a lack of an interpreter at several pretrial hearings. He also mentions, but fails to argue, that trial counsel was ineffective for failing to appear at a pretrial hearing. We find no prejudicial error.

1. Procedural Background

As detailed in the record, there were several pretrial hearings in which the record fails to show that an interpreter was present to assist Soyinthisane. These include May 1, 2012, the first time trial counsel appeared for Soyinthisane's case, in which Soyinthisane pled not guilty and trial counsel withdrew the time waiver ; June 7, when the trial date was vacated and a date set for a settlement conference ; June 14, when the settlement conference was rescheduled for July 5 because trial counsel stated he was "overworked" and "understaffed"; and July 5, when a colleague appeared for trial counsel and asked to continue the settlement conference until July 19.

On July 19, trial counsel appeared with Soyinthisane and an interpreter, and trial was confirmed for August 13.[3] On August 13, the interpreter was not present, but, at trial

[3] Soyinthisane contends that it was not discovered until August 13 that Soyinthisane spoke Laotian and not Hmong. While the reporter's transcript for July 19 states that a

counsel's suggestion and agreed upon by the People, Soyinthisane's sister interpreted for him at that hearing. Because trial counsel had another trial in progress, Soyinthisane's trial was continued to August 20. From that point on, at all hearings, a Laotian interpreter was present, with the exception of one hearing on September 4 where there was no mention of an interpreter, and one hearing on September 5 where trial counsel did not appear and there was no mention of an interpreter. Both of those hearings were strictly for purposes of trailing the case on a day-to-day basis because of trial counsel's other trial conflict. When trial began on September 20, and for the balance of the trial, a Laotian interpreter was present.

2. Applicable Law and Analysis

Article I, section 14 of the California Constitution gives the defendant a right to an interpreter throughout the proceedings against him. This right has several aspects: (1) an interpreter assists questioning of a non-English-speaking witness; (2) an interpreter enables the non-English-speaking defendant to comprehend the proceedings; and (3) an interpreter allows the non-English-speaking defendant to communicate with counsel. (*People v. Aguilar* (1984) 35 Cal.3d 785, 790.) The presence of an interpreter is necessary so the defendant can understand and fully participate in the proceedings. (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010.) "[A]t moments crucial to the defense - when evidentiary rulings and jury instructions are given by the court, when damaging testimony is being introduced - the non-English-speaking defendant who is denied the assistance of an interpreter, is unable to understand and participate in the proceedings which hold the key to freedom." (*People v. Aguilar*, *supra*, at pp. 790-791.) A stipulation by counsel cannot serve as a valid waiver of this right. (*Id.* at p. 794.)

Hmong interpreter was present, the minute order for that date states that the interpreter spoke Laotian.

If no interpreter is provided, the defendant must show that he was prejudiced by the omission. We employ the "'harmless beyond a reasonable doubt'" standard of review in examining whether the deprivation requires reversal. (*People v. Rodriguez, supra,* 42 Cal.3d at pp. 1011-1012; *Chapman v. California* (1967) 386 U.S. 18, 24.) Even where some deprivation is shown, the absence of a personal interpreter may be found harmless because the proceedings which took place while the interpreter was absent may be unsubstantial or concern matters which are not possibly prejudicial to the defendant. (*People v. Rodriguez, supra,* at p. 1011.)

A review of the record reveals no prejudice. As Soyinthisane acknowledges, all of the proceedings without an interpreter to which he objects were prior to trial. Nothing of significance occurred during these proceedings that could have materially interfered with Soyinthisane's rights. Apart from the May 1 hearing when Soyinthisane pled not guilty, the hearings Soyinthisane appeared at without an interpreter were held only for scheduling purposes. Soyinthisane does not argue that he would have pled guilty at the May 1 hearing had he had a translator's assistance at that hearing. In addition, the record shows that an interpreter was present at many of the pretrial hearings in which Soyinthisane trial was continued, and Soyinthisane never raised an objection to the delays. It is therefore beyond a reasonable doubt that Soyinthisane would have received the same result even if an interpreter had been present at all of his pretrial hearings.

Soyinthisane argues, only in passing, that counsel was also ineffective for failing to appear at the September 5 hearing, where Soyinthisane appeared without counsel or an interpreter. The purpose of the hearing was only to trail trial on a day-to-day basis due to trial counsel's conflicting schedule. Again, Soyinthisane cannot show any prejudice, as at the very next hearing the following day, September 6, Soyinthisane again appeared, this time with trial counsel and an interpreter and again waived time.

Soyinthisane cannot show that he was prejudiced by the lack of an interpreter at several pretrial hearings, or for that matter, trial counsel's presence at one hearing, and we reject his argument to the contrary in his direct appeal and petition.

II. CUMULATIVE ERROR

Soyinthisane finally contends, both on his appeal and the petition, that the cumulative impact of all of the above errors deprived him of a fair trial. We have either rejected Soyinthisane's claims of error and/or found any errors, assumed or not, were not prejudicial. Viewed cumulatively, we find that any errors do not warrant reversal of the judgment. (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed and the petition for writ of habeas corpus is denied.

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Franson, J.

WE CONCUR:

_____
Cornell, Acting P.J.

_____
Gomes, J.